

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ENTERPRISE MANAGEMENT
LIMITED, INC., MARY LIPPITT,

Plaintiff,

v.

CONSTRUX SOFTWARE BUILDERS,
INC, STEVE C. MCCONNELL,

Defendant.

CASE NO. 2:19-CV-1458-DWC

ORDER ON MOTIONS FOR
ATTORNEY FEES AND COSTS

Currently pending before the Court is Defendants Construx Software Builders, Inc. and Steve C. McConnell's Motion for Attorneys' Fees and Motion for Bill of Costs and Plaintiffs Enterprise Management Limited, Inc. and Mary Lippitt's Motion for Attorneys' Fees and Motion for Bill of Costs. Dkts. 197, 199, 202, 204.¹ After considering the relevant record, the parties' Motions for Attorney Fees (Dkts. 197, 202) and Plaintiffs' Motion for Bill of Costs (Dkt. 204) are denied. Defendants' Motion for Bill of Costs (Dkt. 199) is granted-in-part as follows: Defendants are awarded post-offer costs in the amount of \$3,993.03.

¹ Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 11, 12.

1 **I. Background**

2 The following procedural history is relevant to determining if a fee award is warranted in
3 this case:

4 Plaintiffs initiated this lawsuit on September 11, 2019. Dkt. 1. In the First Amended
5 Complaint (“Complaint”), Plaintiffs alleged Defendants unlawfully copied and distributed
6 Plaintiff Lippitt’s works or derivations based on her works, which are owned by Plaintiff
7 Enterprise, without permission. Dkt. 29.² Plaintiffs also alleged Defendants used Plaintiff
8 Lippitt’s name to benefit their business without Plaintiff Lippitt’s permission in violation of
9 Washington State’s Consumer Protection Act (“CPA”) and Personality Rights Act. *Id.*

10 Defendants filed a motion to dismiss on December 26, 2019. Dkt. 31.³ The motion to
11 dismiss was granted-in-part and denied-in-part. Dkt. 37. The Court found Plaintiffs stated a
12 copyright infringement claim against Defendants regarding one of Defendants’ works – the
13 Managing Complex Change chart. *Id.* However, the Court dismissed Plaintiffs’ copyright
14 infringement claim regarding Defendants’ Domino Change Model, the Washington State CPA
15 claims, and any claims under the Washington State Personality Rights Act. *Id.*

16 Defendants next filed a motion for summary judgment, which was granted-in-part and
17 denied-in-part. Dkt. 46, 51. The Court found no genuine issue of fact remained regarding
18 copyright infringement claims arising from Plaintiffs’ Managing Complex Change chart as there
19 was no valid copyright registration. Dkt. 51. The Court allowed one copyright infringement
20

21 _____
22 ²Plaintiffs alleged their first chart, Managing Complex Change, is protected under U.S. Copyright
Registration No. TX 2-124-202. *See* Dkt. 29, ¶ 22. Plaintiffs alleged their second chart, Aligning for Success, is
protected under U.S. Copyright Registration Nos. TXu 956-226 and TX 50827-350. *See id.* at ¶ 23.

23 ³ Defendants initially filed a motion to dismiss in October 2019. Dkt. 15. After Defendants filed the first
24 motion to dismiss, Plaintiffs sought leave to file an amended complaint. *See* Dkt. 18. Plaintiffs’ motion to amend
was granted and the first motion to dismiss was denied without prejudice. Dkt. 27.

1 claim to remain related to Plaintiffs' Aligning for Success chart. *Id.* Thus, after the Court's
2 rulings on the motion to dismiss and the motion for summary judgment, the only claim
3 remaining in the case was whether Defendants were liable for copyright infringement of
4 Plaintiffs' Aligning for Success chart. *See* Dkt. 37, 51. The case proceeded to trial and, on March
5 25, 2022, the jury rendered a defense verdict finding Defendants did not infringe the copyrighted
6 work of registration number TXu-956-226 or TX-5-827-350, wherein the Aligning for Success
7 chart was registered. Dkt. 98.

8 After the jury rendered a defense verdict, Plaintiffs appealed. Dkts. 101, 110. The Ninth
9 Circuit reversed the grant of summary judgment and vacated the jury verdict because Plaintiffs
10 had created a genuine issue of material fact regarding whether Lippitt registered the Managing
11 Complex Change chart and, as a matter of first impression, Plaintiffs could attempt to show
12 copyright infringement if the elements of the original work were included in the registration of a
13 derivative work. Dkt. 130.

14 On remand, the parties filed motions for summary judgment. Dkts. 139, 140. After
15 consideration of the motions for summary judgment, the Court granted Defendants' partial
16 motion for summary judgment and the only remaining claim was whether Defendants were liable
17 for copyright infringement of Plaintiffs' Managing Complex Change chart. *See* Dkt. 163. This
18 case proceeded to trial and, on June 12, 2024, the jury determined Plaintiffs did not prove the
19 Managing Complex Change chart was registered via the TX 2-124-202 registration. However,
20 the jury determined Defendants infringed on the portions of the Managing Complex Change
21 chart proven to have been effectively registered in the TXu-956-226 or the TX-5-827-350
22 registrations. *See* Dkt. 196. The jury awarded Plaintiffs damages in the amount of \$8,000.00. *Id.*;
23 *see also* Dkt. 193.

1 The parties have now filed the pending Motions for Attorneys' Fees and Motions for Bill
2 of Costs. The Motions have been fully briefed. Dkts. 197-98, 199-200, 202-03, 204-209, 212-15,
3 219.

4 **II. Request to Strike**

5 Defendants have filed a surreply requesting the Court strike the declaration of Benjamin
6 Hodges submitted with Plaintiffs' Reply in Support of Plaintiffs' Motion for Attorneys' Fees.
7 See Dkts. 216, 217. Defendants contend Plaintiffs asserted new evidence or argument for the first
8 time in the reply. Dkts. 217.

9 "It is well established that new arguments and evidence presented for the first time in [a]
10 Reply are waived." *DocuSign, Inc. v. Sertifi, Inc.*, 468 F.Supp.2d 1305, 1307 (W.D. Wash. 2006)
11 (citing *United States v. Patterson*, 230 F.3d 1168, 1172 (9th Cir. 2000)). While the court may
12 refuse to consider evidence submitted for the first time in a reply, *Zamani v. Carnes*, 491 F.3d
13 990, 997 (9th Cir. 2007), the Court may consider evidence and argument submitted with a reply
14 that is responsive to arguments raised in the non-moving party's brief in opposition. See *PSM*
15 *Holding Corp. v. Nat'l Farm Fin. Corp.*, 2013 WL 12080306, at *4 (C.D. Cal. Oct. 8, 2013),
16 *aff'd in part*, 884 F.3d 812 (9th Cir. 2018). "[W]here new evidence is presented in a reply to a
17 motion for summary judgment, the district court should not consider the new evidence without
18 giving the [non-] movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478, 1483
19 (9th Cir. 1996) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990)).

20 The Court has reviewed the relevant documents and finds Plaintiffs' arguments and
21 citations to new evidence in their reply are relevant to the arguments raised in Plaintiffs' Motion
22 for Attorneys' Fee (Dkt. 202) and should have been submitted at that time. The Court declines
23 to consider any new evidence raised Mr. Hodges' declaration.

III. Fee Award under Copyright Act

Section 505 of the Copyright Act provides that the Court may “award a reasonable attorney’s fee to the prevailing party” in a copyright action. 17 U.S.C. § 505. “[A]ttorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

A. Prevailing Party

Both parties assert that they are a prevailing party in this case. Dkts. 197, 202. “Prevailing party” is defined as “a party in whose favor a judgment is rendered, regardless of the amount of damages awarded.” *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001). “Prevailing party” in varying fee-shifting statutes are interpreted consistently. *CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 422 (2016) (“Congress has included the term ‘prevailing party’ in various fee-shifting statutes, and it has been the Court’s approach to interpret the term in a consistent manner”). The Court recognizes that, often, the party for whom final judgment is entered is the “prevailing party.” See *Buckhannon*, 453 U.S. at 603 (citing Black’s Law Dictionary defining prevailing party as a party in whose favor judgment is rendered). In this case, the judgment was rendered in favor of Plaintiffs. Therefore, the Court finds Plaintiffs are the prevailing party. The Court declines to find Defendants are the prevailing party; therefore, Defendants’ Motion (Dkt. 197) is denied.

B. Entitlement to Attorney’s Fees

As the Court has determined Plaintiffs are the prevailing party, the Court must now assess whether Plaintiffs are entitled to a fee award. “There is no precise rule or formula” for determining whether a prevailing party in a particular case is entitled to a fee award. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436–37

(1983)). Rather, “equitable discretion should be exercised” by the Court. *Id.* However, the Supreme Court established two restrictions: (1) “a district court may not ‘award[] attorney’s fees as a matter of course’; rather a court must make a more particularized, case-by-case assessment;” and (2), “a court may not treat prevailing plaintiffs and prevailing defendants any differently[.]” *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 202 (2016) (citing *Fogerty*, 510 U.S. at 527, 533–34)). “[A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.” *Fogerty*, 510 U.S. at 527.

To guide the Court in determining if a fee should be awarded, the Court considers several nonexclusive factors, including (1) the degree of success obtained, (2) whether the claims were frivolous, motivated by bad faith, and/or objectively unreasonable, (3) the need for compensation and deterrence, and (4) whether the chilling effect of a fee award may be too great or impose an inequitable burden on an impecunious plaintiff. *See Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 -614-15 (9th Cir. 2010); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 675 (9th Cir. 2017). “These factors are not exclusive, and not all need to be considered or met.” *Coble v. Renfro*, 2012 WL 1077843, at *1 (W.D. Wash. March 30, 2012) (citing *Fogerty*, 510 U.S. at 558).

i. Success in this action

First, Plaintiffs assert they were successful in this case because they are the prevailing party. Dkt. 202. Plaintiffs, however, had limited success in this case. Plaintiffs filed this action alleging Defendants infringed on three different copyrights, violated the consumer protection act, and violated personality rights under R.C.W. § 63.60.010. Dkt. 29. After a motion to dismiss was granted-in-part, only one copyright claim remained. In litigating the copyright claim, Plaintiffs

1 were unsuccessful at proving access and copying of the Aligning for Success chart at both the
2 first jury trial and in a subsequent summary judgment motion after remand. Further, at the
3 second trial, Plaintiff was unable to prove that she had a copyright registration for the Managing
4 Complex Change chart; rather, the jury found elements of the Managing Complex Change chart
5 had been registered by her later copyright registrations. Finally, the jury awarded \$8,000.00,
6 finding Defendants' conduct was not willful and awarding damages in the lower range of the
7 allowed damages.

8 Plaintiffs sought recovery for multiple alleged claims but were only able to prove that
9 portions of one chart, registered through a derivative chart, were copied by Defendants.
10 Therefore, the Court finds Plaintiffs' success in this case does not weigh in favor of awarding
11 fees. *See Greg Young Publ'g, Inc. v. Zazzle, Inc.*, 785 F. App'x 417, 419 (9th Cir. 2019) (finding
12 the district court did not abuse its discretion when it did not award the plaintiff attorney fees
13 when the plaintiff established liability but only recovered a portion of damages at trial and the
14 defendant had success on other works at the summary judgment stage).

15 ii. Objectively Unreasonable

16 Second, Plaintiffs assert Defendants were objectively unreasonable in refusing to make
17 settlement offers for the first two years of this dispute. In exercising its authority to award a
18 reasonably attorney's fee, the Court should give substantial weight to the objective
19 reasonableness of the losing party's position. *Kirtsaeng*, 579 U.S. at 200. Defendants' settlement
20 offers or lack thereof do not appear to have extended this case or to have been objectively
21 unreasonable. The parties were unable to reach a settlement at the initial stages of the case. The
22 record indicates that within one month of initiating this case, Plaintiffs were unwilling to settle
23 this case unless Defendants changed their position regarding damages and removing
24

1 McConnell’s book from publication. *See* Dkt. 209-10 at 2-3. McConnell’s book included the
2 Domino Change Model (Dkt. 208 at 2) and Defendants successfully defended the copyright
3 claim related to the Domino Change Model in the motion to dismiss. As such, Defendants
4 “refusal” to change their position on the book was not unreasonable.

5 After Defendants filed a motion to dismiss, Plaintiffs increased their settlement demand
6 from \$70,000 to \$183,000. *See* Dkt. 203. Then, after several claims were dismissed by the Court
7 including the Domino Change Model, Plaintiffs’ settlement demand increased to \$225,000. Dkt.
8 203 at 21. The parties attempted a mediation, which was unsuccessful. Dkt. 57.

9 After dispositive motions and a trial, the jury returned a defense verdict in March of
10 2022, approximately 2.5 years after the initiation of this case. *See* Dkts. 98, 101. Defendants’
11 decision to not make settlement offers during the first two years of this case, as alleged by
12 Plaintiffs, is not objectively unreasonable in light of the success of the motion to dismiss related
13 to the Domino Change Model, an initial defense verdict, and Plaintiffs’ unreasonable settlement
14 offers.⁴

15 When the Ninth Circuit reversed and remanded the case, Defendants quickly made offers
16 of judgment. Dkts. 201-1, 201-2. Then, on a motion for summary judgment, Defendants were
17 able to show there was no question of material fact regarding whether Defendants had access to
18 the Aligning for Success chart. Dkt. 163. The Court notes that, throughout this case, Plaintiffs
19 presented additional, “new” evidence that should have been discovered and presented earlier. For
20 example, after the case was remanded from the Ninth Circuit, Lippitt “discovered” additional
21 evidence. *See* Dkt. 150 at 4. However, this “new” evidence had been in Lippitt’s possession
22

23 ⁴ The Court recognizes that Plaintiffs can make settlement demands as they deem appropriate. However,
24 increasing the settlement demand after a motion to dismiss has been filed and after the Court dismissed several
claims does not show a good faith effort to settle this case.

1 before she initiated this case and the “new” evidence required Defendants to conduct additional
2 discovery, including another deposition of Lippitt. *See* Dkt. 154. Plaintiffs’ failure to search for
3 and disclose all evidence during the discovery period resulted in increased costs and fees.
4 Defendants, in the face of shifting case theories and “new” evidence, continued to diligently
5 litigate the case and narrow the issues for trial.

6 At the second trial, Defendants’ position that Plaintiffs did not have a valid copyright
7 registration for the only remaining chart was successful; the jury found Plaintiffs did not have a
8 valid copyright registration for the Managing Complex Change chart. *See* Dkt. 193. It was also
9 reasonable for Defendants to argue the elements of the Managing Complex Change chart that
10 were included in the subsequent registrations were not sufficient to show Defendants infringed
11 on the copyright. The jury determined that there was an infringement, but it was not willful. Dkt.
12 193.

13 Plaintiffs allege that Defendants’ “fair use” defense was objectively unreasonable. Dkt.
14 202. However, the “fair use” defense was presented to the jury. *See* Dkt. 193. While the jury did
15 not find Defendants proved any of their use was a fair use, the fact that it was presented to the
16 jury is sufficient to show the position was objectively reasonable. *See VMG Salsoul, LLC v.*
17 *Ciccone*, 824 F.3d 871, 887 (9th Cir. 2016) (finding that if a party’s claim “hinges on disputed
18 facts sufficient to reach a jury, that claim necessarily is reasonable because a jury might decide
19 the case in [that party’s] favor”).

20 Overall, the record reflects Defendants’ litigation of this case was not objectively
21 unreasonable.

1 iii. Motivation/Bad Faith

2 Plaintiffs also argue Defendants had improper motivation to delay this case and require
3 the parties to incur increased fees and costs. Dkt. 202. First, Plaintiffs state that Defendants had
4 improper motives because Defendants refused to make a settlement offer for the first two years
5 of this case. As the Court has found Defendants' decisions regarding settlement offers was not
6 objectively unreasonable, the Court finds the same reasoning shows Defendants' decisions
7 regarding settlement offers was not done in bad faith or with improper motivation. *See* Sec. III,
8 B., ii, *supra*.

9 Plaintiffs next argue there was improper motivation because defense counsel, Larry
10 Graham, is Defendant McConnell's brother-in-law and, because defense counsel was being paid
11 by Defendants' insurance policy, Defendants were motivated to increase defense costs as they
12 would be funded by insurance or Plaintiffs. Dkt. 202 at 7-8. Plaintiffs' arguments about the
13 relationship between McConnell and Mr. Graham and continued references to the fact
14 Defendants' litigation expenses are covered by an insurance contract are not well-taken. Beyond
15 bald assertions of their relationship, Plaintiffs have provided no evidence McConnell selected
16 Mr. Graham to represent Defendants. For example, it is entirely possible the insurance company
17 had full control over the law firm and attorney that would represent their interests in this matter.
18 Regardless, neither the relationship between McConnell and Mr. Graham nor the source of
19 payments is of any import to this Court's decision. Plaintiffs have provided no evidence that Mr.
20 Graham's relationship with McConnell impacted this case. The record and Mr. Graham's
21 experience show he was well-qualified to represent Defendants in this matter. This factor weighs
22 against awarding attorney fees.

1 iv. Need for deterrence and compensation

2 When evaluating a motion for fees under § 505, courts may consider whether there is a
3 “need ... to advance considerations of compensation and deterrence.” *Kirtsaeng*, 579 U.S. at 202
4 (quoting *Fogerty*, 510 U.S. at 534). “Deterring non-meritorious lawsuits against defendants seen
5 as having ‘deep pockets’ and compensating parties that must defend themselves against meritless
6 claims are both [laudable] ends.” *Scott v. Meyer*, 2010 WL 2569286, at *3 (C.D. Cal. June 21,
7 2010). This factor supports an award of fees if the losing party should be deterred from
8 presenting in the future the claims (or defenses) that it asserted in the case in which fees are
9 sought. *Epikhin v. Game Insight North America*, 2016 WL 1258690, *8 (N.D. Cal. Mar. 31,
10 2016). The deterrence factor overlaps with those concerning motivation, frivolousness, and
11 objective unreasonableness. *King v. IM Global*, 2017 WL 2620695, at *3 (C.D. Cal. Jan. 25,
12 2017); *Design Data Corp. v. Unigate Enter., Inc.*, 2014 WL 5513541, at *2 (N.D. Cal. Oct. 31,
13 2014) (“There is value in deterring frivolous lawsuits”). While a district court *may* award fees
14 where recovery is small, *Wall Data Inc. v. L.A. County Sheriff's Dep't*, 447 F.3d 769, 787 (9th
15 Cir. 2006), a district court does not abuse its discretion by not awarding them in such
16 circumstances.

17 Here, Defendants’ positions were not objectively unreasonable and the Court does not
18 conclude that Defendants should have been deterred from pursuing their defenses. As discussed
19 above, Defendants successfully defended several claims prior to trial and, at trial, Defendants
20 were successful in arguing Plaintiffs did not have a valid copyright registration for the Managing
21 Complex Change chart. Moreover, the only issue that was successful at trial was based on a
22 matter of first impression – whether elements of Plaintiffs’ chart could be registered in a
23 copyright registration of a derivative work.
24

1 The Court recognizes the award amount is low and that it would be difficult to litigate a
2 copyright case for \$8,000.00. However, the record reflects Plaintiffs filed meritless claims,
3 knowingly pursued baseless claims, and sought settlement amounts that exceeded the value of
4 this case. As discussed above, Plaintiffs stated they would not settle this case unless McConnell
5 removed his book from publication; however, the claim related to McConnell's book failed as a
6 matter of law. Then, after claims were dismissed, Plaintiffs continued to increase their settlement
7 demands. In fact, by March 2021, Plaintiffs asserted Defendants' total liability exceeded \$4
8 million and offered to settle the case for \$775,000. *See* Dkt. 209-15. The maximum statutory
9 amount that could be awarded was \$150,000.00 and, even after two trials and an appeal,
10 Plaintiffs incurred approximately \$1 million in total costs and fees. Valuing this case at over \$4
11 million before the first trial occurred is a concern to the Court. Moreover, evidence shows
12 Plaintiffs have a history of engaging in litigation over the specific charts at issue in this case and,
13 during the litigation process, increasing settlement demands and over-valuing the charts. *See*
14 Dkts. 209-1 – 209-7. Further, Plaintiffs were aware Defendants had an insurance policy covering
15 the costs and, thus, had "deep pockets." *See* Dkt. 106, Hodges Dec., ¶ 5 (aware Defendants had
16 an insurance carrier no later than March of 2021); Dkt. 209-15 (letter referencing the value of the
17 case exceeding \$4 million and making settlement offer of \$775,000 states that Lippitt was
18 willing to schedule mediation if the insurance carrier would be present).

19 Defendants' litigation position was objectively reasonable and should not be deterred by
20 awarding fees to Plaintiffs. However, Plaintiffs' unreasonable settlement demands and attempts
21 to litigate non-meritorious claims in this Court and in other courts warrants declining a fee award
22 as a deterrence. For these reasons, this factor weighs against a fee award.

1 v. Serves the purposes of the Copyright Act

2 The Court must assess if whether awarding fees in this case would further the purposes of
3 the Copyright Act. *See Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1040 (9th Cir.
4 2018). The Copyright Act’s “primary objective” is to “encourage the production of original
5 literary, artistic, and musical expression for the good of the public.” *Fogerty*, 510 U.S. at 524.

6 As *Fogerty* explained, “copyright law ultimately serves the purpose of enriching
7 the general public through access to creative works.” 510 U.S., at 527, 114 S.Ct.
8 1023; *see* U.S. Const., Art. I, § 8, cl. 8 (“To promote the Progress of Science and
9 useful Arts”). The statute achieves that end by striking a balance between two
10 subsidiary aims: encouraging and rewarding authors’ creations while also enabling
11 others to build on that work. *See Fogerty*, 510 U.S., at 526, 114 S.Ct. 1023.
12 Accordingly, fee awards under § 505 should encourage the types of lawsuits that
13 promote those purposes.

14 *Kirtsaeng*, 579 U.S. at 204. A successful defense furthers the purposes of the Copyright Act just
15 as much as a successful infringement suit does. *See Fogerty*, 510 U.S. 517 at 114 (“[D]efendants
16 who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate
17 them to the same extent that plaintiffs are encouraged to litigate meritorious claims of
18 infringement.”).

19 Defendants were successful in defending this action through the first trial. Then, the
20 Ninth Circuit remanded this case, in part, on a matter of first impression – whether a copyright
21 owner’s registration of a derivative work also registers the included elements of an original,
22 unregistered work. *See* Dkt. 130. Plaintiffs success was limited to a jury finding only that
23 Defendants copied portions of the Managing Complex Change chart that were included in the
24 copyright registrations of a derivative work. Plaintiffs were awarded \$8,000.00.

This lawsuit required Defendants to litigate the Domino Change Model, a work that
expressed ideas in a new way, which is precisely the purpose of the Copyright Act. As such,
Defendants’ litigation of the Domino Change Model promoted the purposes of the Copyright

1 Act. Defendants' pursuit of meritorious defenses resulted in encouraging the creation of works
2 and allowing others to build on those works. Plaintiffs had success in establishing that a
3 derivative work could register an original, unregistered work and was successful in proving the
4 elements of the original work had been copied. The Court finds that both positions furthered the
5 purposes of the Copyright Act. Therefore, this factor is neutral and does not weigh in favor of
6 awarding fees to Plaintiffs.

7 vi. Chilling Effect

8 Finally, the Court notes denying a fee award in this case will not impose a chilling effect
9 that is too great or impose an inequitable burden on an impecunious plaintiff. This case has been
10 pending for 4.5 years. There have been two trials, which resulted in a verdict of only \$8,000.00
11 in damages. Plaintiffs were unable to prove (1) Lippitt obtained a copyright registration for her
12 Managing Complex Change chart, (2) Defendants accessed the Aligning for Success Chart; and
13 (3) that the Domino Change Model constituted copyright infringement. Plaintiffs had limited
14 success in this case. Both Plaintiffs and Defendants are similarly situated in that the named
15 parties are the respective business and business owner. Plaintiffs' request for approximately
16 \$950,000 in attorneys' fees without having complete success in this case would in fact chill
17 future litigants from defending claims such as this. For these reasons, the Court finds the chilling
18 effect of the fee award requested in this case far exceeds the potential chilling effect a plaintiff
19 might feel in pursuing a meritorious copyright action. Therefore, this factor weighs against an
20 attorneys' fee award.

vii. Conclusion

The Court has considered the factors outlined by this Circuit. After balancing the relevant factors, the Court finds an award of “full costs,” including “a reasonable attorneys’ fee,” is not warranted under § 505 in this case.

IV. Sanctions for Filing Motion

Plaintiffs request this Court sanction Defendants for filing a frivolous Motion for Attorney’s Fees. *See* Dkt. 207. While the Court did not find Defendants were a prevailing party, the Court does not find Defendants’ position was so frivolous, unreasonable, or vexatious as to warrant sanctions. Here, both parties prevailed on substantive claims that affected the material legal relationship between the parties. Defendants prevailed on a claim that the Domino Change Model infringed on Plaintiffs’ copyright.⁵ Defendants also prevailed on Plaintiffs’ claim that Defendants infringed on Plaintiffs’ Aligning Chart. Defendants, therefore, were able to continue publishing a book containing the Domino Change Model and no longer have a concern about being sued for copyright infringement related to the Domino Change Model or the Aligning for Success chart. The Court has denied Defendants’ motion for fees, but this finding does not minimize the arguments raised by Defendants or make their Motion frivolous. Therefore, the Court denies Plaintiffs’ request to sanction Defendants.

V. Costs

Plaintiffs and Defendants also move for costs. *See* Dkts. 199, 204. Plaintiffs only requested costs pursuant to 17 U.S.C. § 505. Under § 505, costs are award to the prevailing party only within the Court’s discretion. As discussed above, the Court finds Plaintiffs have not shown

⁵ The Court finds the Domino Change Model claim was a separate and distinct copyright claim. Plaintiffs even concede the claim related to the Domino Change Model was a claim directed at a separate set of accused works. *See* Dkt. 207 at 5, n.3.

costs are warranted under § 505. Rather, the Court finds both parties should pay their own pre-offer costs. Defendants, however, are entitled to post-offer costs under Rule 68(d). Under Rule 68(d), “[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” Evidence shows Defendants made an offer of judgment of \$30,000.00 on July 27, 2023 and an offer of judgment of \$150,000.00 on August 14, 2023. Dkts. 201-1, 201-2. Plaintiffs received a judgment of \$8,000.00. As Plaintiffs did not obtain a judgment more favorable than either unaccepted offer, Plaintiffs must pay Defendants’ costs incurred after July 27, 2023. Therefore, Defendants are entitled to costs in the amount of \$3,993.03 (costs awarded for supplemental deposition of Lippitt - \$1,082.45, costs of copies - \$2,276.08, and costs for trial transcripts - \$634.50).⁶

VI. Conclusion

For the reasons articulated in this Order, the Court finds an award of attorneys’ fees is not warranted this case. Accordingly, the Motions (Dkts. 197, 202) are denied. Plaintiffs’ Motion for Bill of Costs (Dkt. 204) is denied. Defendants’ Motion for Bill of Costs (Dkt. 199) is granted-in-part as follows: Defendants are awarded post-offer costs in the amount of \$3,993.03.

Dated this 5th day of August, 2024.



David W. Christel
United States Magistrate Judge

⁶ The Court also notes that the Ninth Circuit imposed costs against Defendants in the amount of \$885.00. See Dkt. 131 (costs were taxed against Defendants in the amount of \$885.00). Plaintiffs assert Defendants have not yet paid the costs. Plaintiffs request this Court direct Defendants to pay the costs imposed by the Ninth Circuit. Plaintiffs, however, have not cited to any legal authority showing this Court should further direct Defendants to pay the costs imposed by the Ninth Circuit.